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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(Magistrate Cathy A. Bencivengo)

UNITED STATES OF AMERICA,)	CASE NO. 08CR 1191 DMS
)	08MJ 1009
Plaintiff,)	
vs.)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF
)	VIDEOTAPE DEPOSITION AND
Angel Jose BERMUDEZ (D1))	SUBSEQUENT VOLUNTARY DEPORTATION
David PEREZ-Lemos (D2))	OF MATERIAL WITNESSES
)	
)	DATE: April 29, 2008
)	TIME: 10:30 a.m.
<u>Defendants.</u>)	PLACE: Courtroom of Magistrate
		Cathy A. Bencivengo

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**BY STATUTE AND CASE LAW,
THE MOTION SHOULD BE GRANTED**

According to 18 U.S.C. 3144, "no material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition and if further detention is not necessary to prevent a failure of justice".

Furthermore, Fed R. Crim P. 15(a) specifies that a material witness may make a motion requesting such a deposition and the district court has the authority to order the taking of the deposition and thereafter to discharge the detained witness from

1 custody.

2 As the Fifth Circuit stated In Aguilar-Ayala v. Ruiz, 973 F.2d
3 411 (1992) at page 413:

4 Read together, Rule 15(a) and section 3144 provide a
5 detained witness with a mechanism for securing his own
6 release. He must file a "written motion", Fed. R. Crim.
7 P. 15(a), requesting that he be deposed. The motion must
8 demonstrate that his "testimony can adequately be secured
9 by deposition" and that "further detention is not necessary
10 to prevent a failure of justice" 18 U.S.C. section 3144.
11 Upon such showing, the district court must order his
12 deposition and prompt release. Id. ("No material witness
13 may be detained" if he makes such a showing). Although
14 Rule 15(a) is couched in the permissive "May" not the
15 mandatory "shall", Fed R. Crim. P. 15(a) ("the court...may
16 direct that the witness' deposition be taken"), it is
17 clear from a conjunctive reading with section 3144 that
18 the discretion to deny the motion is limited to those
19 instances in which the deposition would not serve as an
20 adequate substitute for the witness' live testimony: that
21 a "failure of justice" would ensue were the witness
22 released...absent a "failure of justice", the witness must
23 be released.

24 Any ambiguity in Rule 15(a) was resolved when the statute was
25 amended in 2002 to differentiate between motions for depositions
26 brought by other parties as opposed to such motions brought by the
27 material witness themselves. The new statutory language holds that
28 when a material witness files their own motion for a deposition,
they do not even need to show any "exceptional circumstances" exist.
The amended statute has already been upheld on appeal, United States
v. Chen (N.D. Cal. 2003) 214 F.R.D. 578.

29 This is also the law in the Ninth Circuit as demonstrated by
30 the case of Torres -Ruiz v. United States District Court for the
31 Southern District of California, 97 CDOS 5335 (July 7, 1997). The
32 court "agreed with the reasoning of [Aguilar-Ayala, supra]" and
33 reversed Judge Huff who had denied a motion for a deposition on
34 facts virtually identical to the instant action . As the court

1 stated:

2 In the instant case, two young men ages 19 and 22, have
3 apparently been randomly selected out of a group of 27
4 undocumented aliens and detained for a period of over 60
5 days as material witnesses in a straightforward and
6 uncomplicated alien smuggling prosecution. These young
7 men state without opposition by either party to this case
8 that they are the sole support for their respective
9 families in Mexico, and that every day they remain in
10 custody is a tremendous hardship on those family members.
11 (Kilpatrick Declaration at 2) Neither petitioner is able
12 to provide a surety for \$1000.00 bond. It is exactly
13 circumstances such as these for which section 3144 appears
14 to be designed.

15 Respectfully submitted,

16 LAW OFFICES OF THOMAS G. GILMORE

17 DATED: 4/18/2008

18 By: /ss/ Thomas G. Gilmore
19 Thomas G. Gilmore, Esq.
20 Attorney for Material Witnesses
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